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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

AMOCO PRODUCTION COMPANY and
MARATHON OIL COMPANY,
Petitioners,

v.

JICARILLA APACHE TRIBE, JICARILLA APACHE TRIBAL COUNCIL, GWENDOLYN VELARDE, TREASURER OF THE JICARILLA APACHE TRIBE, and CECIL ANDRUS, Secretary of the Interior,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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The Petitioners Amoco Production Company ("Amoco") and Marathon Oil Company ("Marathon") respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit entered February 22, 1980 and amended on April 25, 1980.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Jicarilla Apache Tribe has power to tax severance of oil and gas from its Executive Order Indian reservation by non-Indian lessees.

2. Whether overriding national interests expressed in the Congressional grant to the states of the power to tax oil and gas production from reservation lands are frustrated by tribal taxation of the same production.

3. Whether a power to tax founded upon the power to exclude non-members or attach conditions to their entry includes the power to impose a new tribal severance tax on mineral lessees.

4. Whether the Indian and Interstate Commerce Clause of the Constitution bars a tribal tax upon severance from reservation lands of oil and gas, most of which is delivered into interstate commerce,

a. As discriminating against interstate commerce, where the tax applies only to oil and gas "sold or transported off the Reservation," or

b. As imposing a multiple burden upon interstate commerce, where the state in which the reservation is located taxes the same activity.[1]

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[1] *List of other parties.* The only other parties not listed in the caption are a group of producers who, like Petitioners, sued to invalidate the Jicarilla severance tax. The names of those other producers who (we understand) will file a separate Petition are: J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, Jerome T. McHugh, Chase Oil Company, Dugan Production Corporation, Consolidated Oil and Gas, Inc., Southland Royalty Company, Tesoro Petroleum Corporation, Amerada Hess, Supron Energy Corporation, Energy Reserves Group, Inc., J. M. Huber Corporation, Continental Oil Company, Atlantic Richfield Company, Phillips Petroleum Company, Tenneco Oil Company, Getty Oil Company, Gulf Oil Corporation, Mobil Oil Corporation and Oxy Petroleum, Inc.

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OPINION BELOW

The Opinion and Judgment of the Court of Appeals in consolidated appeals by the Jicarilla Apache Tribe ("the Tribe") and the Secretary of the Interior of the District Court's Judgment in favor of the Petitioners and certain others who hold oil and gas leases on the Tribe's reservation appears in Appendix A to this Petition, and is reported at 617 F.2d 537. The Order of the Court of Appeals amending its Opinion and denying a Petition for Rehearing filed by the other Appellees appears in Appendix B. No opinion was rendered by the United States District Court for the District of New Mexico. That Court's Findings of Fact and Conclusions of Law appear in Appendix C, and its Judgment appears in Appendix D.

JURISDICTION OF THIS COURT

The Opinion and Judgment of the Court of Appeals in the consolidated appeals was entered on February 22, 1980. A timely Petition for Rehearing filed by the other Appellees, but not Petitioners Amoco and Marathon, was denied, and the Opinion was amended by the insertion of a new page 6, on April 25, 1980. By Order dated May 9, 1980 (Appendix E), Justice White granted Petitioners an extension of time in which to file a Petition for a Writ of Certiorari to and including June 21, 1980.[2] By Order dated June 12, 1980 (Appendix F), Justice White granted Petitioners Amoco and Marathon a further extension of time to and including July 5, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1976).

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[2] Petitioners filed this application for extension of time on May 9, 1980, as a protective measure, because of the lack of a reliable precedent that their time for seeking certiorari ran from the Order of the Court of Appeals on April 25, 1980, denying the Petition for Rehearing filed by the other Appellees and amending its Opinion.

CONSTITUTIONAL PROVISIONS, STATUTES, TREATY, EXECUTIVE ORDERS AND TRIBAL MATERIALS INVOLVED

The constitutional provisions involved are the Interstate and Indian Commerce Clause, art. I, § 8, cl. 3; these provisions appear in Appendix G. The statutory provisions involved are the Act of March 3, 1927, 25 U.S.C. §§ 398a-e (1976) (Appendix H); Sections 16 and 17 of the Indian Reorganization Act of June 18, 1934, 25 U.S.C. §§ 476-477 (1976) (Appendix I); and the General Leasing Act of May 11, 1938, 25 U.S.C. §§ 396a-f (1976) (Appendix J). This case also involves the Treaty of Guadalupe Hidalgo Between the United States and Mexico, 9 Stat. 922 (Appendix K); Executive Orders relating to the Jicarilla Apache Reservation (Appendix L); Article XI, Section 1, ¶¶(a)(3) and (e) of the Revised Constitution of the Jicarilla Apache Tribe (Appendix M); and the Jicarilla Apache Tribe Oil and Gas Severance Tax Ordinance and accompanying instructions (Appendix N).

STATEMENT OF THE CASE

The Jicarilla Apache Tribe ("the Tribe") resides in an area in Northwestern New Mexico that was ceded to the United States by the Treaty of Guadalupe Hidalgo (App. K) in 1848, after the Mexican-American War. The Tribe was not recognized in the Treaty as a sovereign entity or mentioned in any other way (App. A at 30a-31a) (Seth, C.J., dissenting from the Opinion of the Tenth Circuit). The Tribal lands were made into a reservation by Executive Order (App. A at 5a; App. C at 3c; App. L). The Tribe is organized under the Indian Reorganization Act of 1934. It is undisputed that no treaty or act of Congress has ever provided expressly that the Tribe has any power to impose taxes of any kind upon non-Indians (App. A at 8a).

Petitioners are engaged in the extraction of oil and gas from the Tribe's reservation lands under various leases issued by the Tribal Council and approved by the Secretary of Interior (App. A at 4a; App. C at 4c). Approximately 80% of the oil and gas extracted from the reservation is delivered at the wellhead into interstate pipelines for shipment and sale outside the State of New Mexico (App. A at 6a, 17a; App. C at 4c). All the leases were executed by the Tribe and approved by the Secretary of Interior prior to enactment of the Tribal Severance Tax Ordinance in 1976. The leases provide for the payment of royalties to the Tribe, and specify that no change may be made in the rate of "royalty or annual rental" without the written consent of both parties. Joint Appendix in the Tenth Circuit at A-189. The leases contain no provision expressly reserving to the Tribe any power to impose taxes upon the lessees. *Id.*

Pursuant to authority granted in 1927 (25 U.S.C. § 398c), the State of New Mexico has taxed the production of oil and gas from the Tribe's reservation since 1937 and collects such taxes from Petitioners.[3]

In 1968, the Tribe adopted a Revised Constitution authorizing the Tribal Council to adopt ordinances imposing taxes and fees on non-members of the Tribe doing business on the reservation (App. A at 5a; App. C at 4c; App. M). In 1976, the Tribal Council adopted an ordinance entitled "Oil and Gas Severance Tax" imposing a tax on "any oil and natural gas severed, saved, and removed from Tribal lands" (App. A at 5a; App. C at 4c-5c; App. N). The Revised Constitution and the Ordinance imposing the tax were approved by the Secretary of Interior, through his delegates (App. A at 5a-6a; App.

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[3] *See* New Mexico Statutes Annotated, §§ 7-29-1 to 7-29-22; §§ 7-30-1 to 7-30 26; §§ 7-31-1 to 7-31-25; §§ 7-34-1 to 7-34-20 (1978); New Mexico Laws 1937, Ch. 103.

C at 4c). The Ordinance and the instructions mailed to lessees specified that the tax applied only to oil or gas "sold or transported off the Reservation" (App. A at 6a; App. C at 5c; App. N at 2n, 6n). The Ordinance also expressly consented to the jurisdiction of the United States District Court for actions concerning the tax (App. A at 7a; App. N at 5n).

Petitioners Amoco and Marathon brought an action in the United States District Court for the District of New Mexico seeking a declaratory judgment that they were not liable for the payment of any severance tax and a permanent injunction against collection of the tax.[4] Jurisdiction of the District Court was invoked under the Fifth Amendment and 28 U.S.C. §§ 1331 and 1343(4). The District Court held that the severance tax imposed by the Tribe was "illegal, unconstitutional, invalid and void" and issued a permanent injunction prohibiting enforcement of the taxing ordinance (App. C at 8c; App. D).[5] On appeal, the Court of Appeals for the Tenth

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[4] Petitioners also sued the appropriate New Mexico official requesting a declaratory judgment as to the validity of the New Mexico tax in the event that the Tribal severance tax should be upheld. Since the District Court found the Tribal tax invalid, it was not necessary to consider Petitioners' claims against the state, and they were dismissed without prejudice and with leave to refile in the event that the final judgment in this case should reinstate the Tribal tax. Meanwhile, Petitioners are paying the state tax under protest and have filed statutory refund suits which are being held in abeyance pending final judgment in this case.

[5] The grounds for the District Court's holding were that (1) neither tribal sovereignty nor the Indian Reorganization Act of 1934 empowers the Tribe to enact the tax; (2) 25 U.S.C. § 398c grants the State of New Mexico the exclusive right to tax lessees; and (3) the tax discriminates against and constitutes a multiple burden on interstate commerce in violation of the Commerce Clause (App. C at 7c-8c).

Circuit, sitting en banc, reversed, with two members dissenting.

The Court of Appeals held: First, that the Tribe has power to impose a tax upon non-Indians for the severance of oil and gas from its Executive Order reservation lands without benefit of express authorization in a treaty (App. A at 8a-16a); second, that the Tribe's power to tax was not preempted by the Act of Congress (25 U.S.C. § 398c) expressly authorizing the states to tax the same activity or by the comprehensive congressional regulation of mineral leasing on Indian reservations (App. A at 20a-26a); and third, that the Tribe's tax did not violate the Interstate and Indian Commerce Clause either by discriminating against interstate commerce or by imposing a multiple burden upon such commerce (App. A at 16a-20a).[6]

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS EXCEPTIONALLY IMPORTANT QUESTIONS OF FEDERAL INDIAN LAW WHICH NEED RESOLUTION.

The Court of Appeals recognized that this case presents exceptionally important questions of federal Indian law, which have not been previously considered by this Court,[7] concerning the power of Indian tribes to tax non-

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[6] The Court of Appeals also held that the Trial Court was without power to enjoin the Secretary of the Interior and that it had jurisdiction over the Tribe (App. A at 6a-8a).

[7] The Court of Appeals expressly recognized that this case presents issues of first impression. App. A at 9a, 14a, 16a. The Court also recognized the exceptional importance of these issues by its *sua sponte* decision to rehear the case en banc before the three members of the panel had published any decision. *See* Fed. R. App. P. 35.

Indian lessees who extract oil or gas from Indian reservation lands for shipment in interstate commerce. The case presents a fundamental conflict between the Congressional grant to the states of power to tax extraction of oil and gas from Indian reservation lands, and the recent and spreading assertions by many Indian tribes of power to tax the same activities. Also present are fundamental questions of first impression concerning whether, and how, Indian taxation is limited by the Interstate and Indian Commerce Clause of the Constitution.[8]

The importance of these questions is heightened by this Court's intervening decision on Indian taxing power in *Washington, et al.* v. *Confederated Tribes of the Colville Indian Reservation, et al.* (hereinafter cited as "*Colville*"), —— U.S. ——, No. 78-630, decided June 10, 1980. That decision neither considered nor resolved the issues presented here, and the further guidance of this Court is needed because these issues are of considerable importance to those producing oil and gas from reservation lands, to the tribes, the energy consuming public, and the states. The Jicarilla severance tax is only one of a series of recently enacted Indian mineral taxes[9]

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[8] As the Tenth Circuit stated, "[i]t appears that no court has analyzed how the tribes are limited in their taxing power by the Indian Commerce Clause" (App. A at 16a).

[9] In addition to the Jicarilla severance tax, the Navajo Tribe enacted "possessory interest" and "business activity" tax ordinances in 1978; both will affect mineral production. See Amicus Brief of Navajo Nation in the Tenth Circuit, Exhibit B-2. The Crow Tribe enacted a coal severance tax in 1976. *See* Amicus Brief of National Congress of American Indians, Inc., *et al.* in *Colville, supra*, at 20. The Shoshone and Arapahoe Tribes of the Wind River Reservation enacted a severance tax in 1978, which became effective in 1980, after the decision of the Tenth Circuit in this case. One suit chal-

representing a significant departure from the status quo.[10] Many cases challenging these new taxes are pending in the lower federal courts,[11] and the issues presented

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lenging this tax is already pending. Any tribe that has leased mineral resources for development can be expected to enact mineral taxes in the wake of the Tenth Circuit decision here.

[10] Although New Mexico has been taxing oil and gas production since 1937 (*see* note 3 *supra*), the Jicarilla Severance Tax Ordinance was not enacted until 1976 (page 3 *supra*). Tribal attempts to tax mineral production are of very recent origin. The Final Report of the American Indian Policy Review Commission (hereinafter "AIPRC Final Report") acknowledged that as of the date of the Report (1977), Indian Tribes usually received royalties but not taxes from mineral production. 1 AIPRC Final Report 344. The Report recommended tribal enactment of such taxes, and repeal of 25 U.S.C. §§ 398 and 398c in order to permit tribal taxation. 1 AIPRC Final Report 174, 181, 347. The recent origin of these Indian mineral taxes is further evidenced by recent law review articles, written by Indian advocates, urging the adoption of such taxes and attempting to marshal legal arguments in their support. *See* Goldberg, *A Dynamic View of Tribal Jurisdiction to Tax Non-Indians*, 40 Law & Contemp. Probs 166 (1976); Comment, *The Case for Exclusive Tribal Power to Tax Mineral Lessees of Indian Lands*, 124 U. Pa. L. Rev. 491 (1975).

[11] The Navajo taxes are under challenge in a number of lawsuits. *See* Exhibits to Amicus Brief of Navajo Nation in the Tenth Circuit, and Amicus Briefs of Salt River Project Agricultural and Power District, *et al.*, and National Congress of American Indians, Inc., *et al.* in *Colville*, *supra*. The Amicus Brief of the Navajo Nation in the Tenth Circuit (p. 2) stated that six actions are presently pending in U.S. District Courts challenging the validity of the tax. One suit has been briefed and awaits argument in the Ninth Circuit. *Salt River Project* v. *The Navajo Tribe of Indians*, Nos. 78-

here will be present in most of those cases. Consideration and decision by this Court now will provide a helpful guide to the lower courts in deciding the difficult questions arising in this "vexing area," [12] and may likely obviate many of the disputes. The issues are clearly drawn; the importance of the questions and the inflation and energy crises also require this Court's intervention now.

The Jicarilla tax imposes a significant burden on the prices of oil and natural gas.[13] Indian mineral taxes will inevitably either cause further increases in the cost of energy to consumers, or discourage production from marginal wells and mines on Indian lands,[14] or both. Furthermore, because any significant increase in the taxes imposed upon the activity of severing oil and gas must

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3492 and 79-3028, consolidated. Another case was recently decided in Utah. *Southland Royalty Company* v. *Navajo Tribe*, Nos. C-79-0140, -0153, -0237, -0296 (D. Utah June 5, 1980) (following the Opinion of the Tenth Circuit in this case).

[12] *Colville*, Slip Op. at 1.

[13] The Jicarilla tax is 5 cents per million BTU of gas and 29 cents per barrel of oil. App. N at 2n. This amounts to 29 percent of the interstate price of old gas and over 12.5 percent of the price of old oil. The tax will yield over $2,000,000 annually to the Tribe. App. A at 6a; App. C at 5c, 6c.

[14] For example, the District Court found that producers would have the right under their contractual provisions to pass most of the burden of the Tribe's tax onto their consumers—which would inevitably increase the prices paid by those consumers—but that if the producers were required to absorb the tax it would substantially limit their ability to operate profitably some of the existing wells, requiring them to shut down such wells. App. C at 5c-6c.

affect the economics of further development and extraction,[15] Indian mineral taxes—unlike the Indian taxes on cigarette sales recently sustained in *Colville*—may adversely affect the states' interests in exercising their Congressionally granted power of taxation of oil and gas production from reservation lands. If the Indian taxes are valid, the states must necessarily reduce their taxes or forego tax increases.[16]

The importance of the issues presented is also emphasized by the extensive mineral resources on Indian lands and the avowed purposes of Indian mineral taxation. Indian reservations contain vast amounts of oil, gas, coal, and uranium, constituting significant percentages of the total known reserves of the United States.[17] Apart from

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[15] *See* F. Jones, *The Struggle for Equitable Taxation of Mines—The New Mexico Example*, 16 Rocky Mt. Min. L. Inst. 463, 478 (1971).

[16] Accordingly, five mineral producing states, including New Mexico, filed amicus briefs below opposing the Tribal severance tax. The four other states were Montana, North Dakota, Utah and Wyoming. As the State of Utah said in its Amicus Brief in the Tenth Circuit (at 7), "If the Tribes are permitted to tax non-Indian producers on Executive Order lands, the States' revenues will be correspondingly eroded because the multiple tax burden resulting from such concurrent tribal and state taxation will certainly curtail oil and gas exploration and production on such lands."

Counsel for the National Congress of American Indians, Inc., admits that the new Crow coal tax, for example, is so high as to price Crow coal out of the market if the Montana taxes on severing coal are valid. *See* Amicus Brief, National Congress of American Indians, Inc., *et al.*, in *Colville*, *supra*, at 20.

[17] Indian reservations contain 3 percent of the known United States reserves of oil and gas and 7-13 percent of known United States coal reserves. In 1974, Indian lands produced 4.4 percent of the total United States production

the obvious purpose of raising revenues, advocates of Indian mineral taxation argue that the new taxes are a "sovereign tool" necessary to enable the tribes to control the rate of extraction of natural resources.[18] Early resolution of the questions presented here is required in order that the tribes, the states, the producers, and the nation may know to what extent development and extraction of urgently needed energy resources may be subjected to the differing development philosophies of the tribal councils of those tribes (among the 287 in this country)[19] having minerals under lease or available for lease.

The Commerce Clause issues themselves demand early resolution. The Tenth Circuit noted that the application of the Interstate Commerce Clause to Indian taxation of non-Indians is a question of first impression and that there are no decisions of this Court to guide the lower courts in resolving these difficult issues (App. A at 16a). This case presents the issues of whether—and how—the Indian and Interstate Commerce Clause limits Indian taxation of minerals which move at severance into interstate commerce. The resolution of these issues will directly affect the national interest in maintaining the free and unrestricted flow of commerce in vital energy resources.

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of oil and gas, 4.9 percent of the total United States phosphate production, and 100 percent of the uranium produced on lands subject to federal control. *See* 1 AIPRC Final Report 7, 338-339 (1977).

[18] *See* Brief in Chief of Secretary of Interior in the Tenth Circuit at 22-23, 27, arguing that the "sovereign" right to tax is necessary to "restrict depletion" of the Tribe's mineral resources and to protect those resources from state and corporate "encroachment." *See also* 1 AIPRC Final Report 179. The second paragraph of the Preamble to the Jicarilla Tax Ordinance recites that the Tribe has the obligation to develop its resources on "sustained yield principles" for the general welfare of the Tribe as a whole (App. N at 1n).

[19] *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 n.21 (1978).

II. THE COURT OF APPEALS' OPINION CONFLICTS WITH THE PRINCIPLES OF *COLVILLE* IN FAILING TO RECOGNIZE THAT 25 U.S.C. § 398c HAS DIVESTED ANY POWER OF TRIBAL TAXATION, AND THAT OVERRIDING NATIONAL INTERESTS WOULD BE FRUSTRATED BY TRIBAL TAXATION OF OIL AND GAS PRODUCTION.

In *Colville* this Court held that Indians had power to tax transactions occurring on their lands and significantly involving their interests unless "divested of it by federal law" or by necessary implication because exercise of the taxing power would be "inconsistent with the overriding interests of the National Government." [20] Substantial questions are presented whether tribal taxing power is divested here on both scores.

The conflicting claims of the states and the Indian tribes to the benefits of severance of oil and gas on Executive Order reservations—unlike the state and tribal cigarette taxes at issue in *Colville*—have been extensively discussed and regulated by Congress. In the Act of March 3, 1927, 25 U.S.C. §§ 398a-e (1976) ("1927 Act") (App. H), Congress balanced these conflicting claims by expressly granting to the states—not the tribes—power to tax the entire output of oil and gas on Executive Order reservations while granting to the tribes the royalty interest in this output. In this and subsequent legislation [21] Congress has created a comprehensive scheme to expedite and regulate oil and gas leasing and production on Executive Order reservations and to divide up the benefits of such production. Substantial questions accordingly arise as to whether any tribal power to tax oil and gas production by non-Indian lessees on Executive Order reservations

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[20] Slip Op. at 15-16.

[21] General Leasing Act of May 11, 1938, 25 U.S.C. §§ 396a-f (1976) ("1938 Act") (App. J).

has been "divested . . . by federal law" or would be "inconsistent with the overriding interests of the National Government." *See Colville, supra*, Slip Op. at 15-16.

The 1927 Act settled a controversy arising from what this Court has called the "consistent . . . understanding" of the executive department that "the rights and interests which the Indians enjoyed in executive order reservations were different from and less than their rights and interests in treaty or statute reservations." *Sioux Tribe* v. *United States*, 316 U.S. 317, 327 (1942).[22] Acting on that understanding, the Department of the Interior had taken the position that Executive Order Indian reservations were subject to leasing as public domain (49 L.D. 139 (1922)), and various leases and prospecting permits were issued for such lands under the Mineral Leasing Act of February 25, 1920 (41 Stat. 139). Attorney General Stone subsequently took a contrary view (34 Op. Att'y Gen. 171, 181 (1924)), but the validity of public domain leasing was upheld by the District Court in Utah.[23] Congress then resolved the matter by the 1927 Act.

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[22] The Court held in *Sioux Tribe* that the interest which the Indians received in Executive Order reservations was "subject to termination at the will of either the executive or Congress" without payment of compensation because the executive acting alone was without power to create a compensable interest in public lands. 316 U.S. at 331. *Accord, Confederated Bands of Ute Indians* v. *United States*, 330 U.S. 169, 176 (1947); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 103 (1949).

[23] *United States* v. *Harrison*, Equity No. 8288, discussed in H.R. Rep. No. 1791, 69th Cong., 2d Sess. 5 (1927). The Court of Appeals certified questions to this Court, but the case

The legislative history reveals that Congress could not have intended that the power of taxation could be exercised by the tribes, as well as the states.[24] Instead, the 1927 Act was a carefully crafted compromise taking into account competing claims advanced by advocates of the states, the tribes and the persons who had applied for and obtained permits in reliance on the Department of the Interior's 1922 ruling.[25] Thus, Sections 1 and 2 of the Act (25 U.S.C. §§ 398a-b) authorized the leasing of Executive Order reservation lands with royalties to be paid to the benefit of the Indians while at the same time Section 3 (25 U.S.C. § 398c) granted to the states power to tax "the entire output of oil and gas" [26] includ-

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was dismissed by stipulation on March 14, 1927, following passage of the 1927 Act. *See United States* v. *Ed. McMahon* [*Harrison*], 273 U.S. 782.

[24] *See* App. A at 52a-54a (Barrett, J., dissenting from the Opinion of the Tenth Circuit).

[25] *See, e.g.*, H.R. Rep. No. 1791, *supra*, at 3, 6; S. Rep. No. 1240, 69th Cong., 2d Sess. 3, 5 (1927); 67 Cong. Rec. 10915, 10919 (1926) (remarks of Senator Bratton) (indicating that the proposed legislation would give all the royalties to the tribes and would give the states the power to tax in lieu of a share of the royalties); S. Rep. No. 768, 69th Cong., 1st Sess. 6 (1926) ("It has been deemed advisable to pay all the royalty income to the credit of the Indians and to permit the State to levy taxes on the entire production within its borders the same as upon unrestricted lands."); H.R. Rep. No. 763, 69th Cong., 1st Sess. 9 (1926); 66 Cong. Rec. 5433 (1925) (remarks of Congressman Hayden) ("Each House had previously agreed that a share of the benefit to come from the development of oil, gas and other minerals on unallotted Indian lands within Executive order Indian reservations should go to the State. Whether the State should have the right to directly collect a tax or whether a share of the rental or royalty should be paid in lieu of the tax was the issue . . . .").

[26] H.R. Rep. No. 1791, *supra*, at 4.

ing the "share obtained for the Indians as bonuses, rentals and royalties." Section 5 (25 U.S.C. § 398e) provided for the protection of prior permittees and applicants.

The Tenth Circuit opined that in passing the 1927 Act, Congress "simply did not think of the issue" of tribal taxation, but concluded that if it had, such taxation would have been permitted because the "majority . . . obviously thought that all benefits from the minerals on the reservations belonged to the Indians." [27] This conclusion flies in the face of the statute and the legislative history.[28]

The balance struck in the 1927 Act—giving the Indians the bonuses, rents, and royalties, and granting the states the power to tax "the entire output of oil and gas," [29] including the "share obtained for the Indians as bonuses, rentals, and royalties"—would be upset by recognition of a tribal power to tax the same production. The use of such power by the tribes could greatly impair

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[27] App. A at 22a.

[28] During the four years of extensive legislative activity that led to the 1927 Act, it was apparently not once suggested by any of those debating the moral and legal rights and interests of Executive Order tribes with respect to minerals underlying their reservations that such tribes would not only receive the royalties but also have power to tax non-Indian lessees for the same output the states were expressly authorized to tax. *See* S. 876, 68th Cong., 1st Sess. (1923); 66 Cong. Rec. 998-99 (1924); 66 Cong. Rec. 2233-2234, 5432-34 (1925); H.R. Rep. No. 1254, 68th Cong., 2d Sess. (1925); H.R. Rep. No. 763, *supra*; S. Rep. No. 768, *supra*; 67 Cong. Rec. 10912-10925, 11379-11397, 11528-11530, 12641 (1926); H.R. Rep. No. 1791, *supra*; S. Rep. No. 1240, *supra*; 68 Cong. Rec. 4569-4581 (1927).

[29] *See* note 26 *supra*.

the ability of the states to raise revenues through taxation.[30]

Furthermore, 25 U.S.C. § 398c is only a part of the fabric of federal laws concerning production of oil and gas from Indian lands. 25 U.S.C. § 396a-f, enacted in 1938 (App. J), regulates the entire process of leasing reservation lands for oil and gas mining purposes; § 396d provides that "[a]ll operations" of lessees of restricted Indian lands are subject to rules and regulations promulgated by the Secretary of Interior. Pursuant to this authority, 25 C.F.R. § 171.1 to 171.30 (1979) contain comprehensive regulations governing the leasing process and production operations. The forms of the leases are prescribed by the Secretary. 25 C.F.R. § 171.30. The pervasive federal regulations evidence a long-standing Congressional policy favoring leasing and development of oil and gas reserves on Indian lands.[31] That federal policy

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[30] *See* pages 8-9 & note 16 *supra*.

[31] These pervasive federal regulations, especially when considered with 25 U.S.C. § 398c, raise serious questions concerning whether Congress could have intended to allow the imposition of additional burdens on lessees in the form of tribal taxes. *Cf. White Mountain Apache Tribe* v. *Bracker*, —— U.S. ——, No. 78-1177 (June 27, 1980). The Court of Appeals dismissed the fabric of federal leasing statutes and regulations because 25 U.S.C. § 396b allows Indian Reorganization Act ("I.R.A.") tribes themselves to lease oil and gas lands without participation or approval by the Secretary of Interior. App. A at 23a-25a. However, the statutes are not so easily ignored. The Jicarillas have not attempted to undertake leasing "on their own." Any I.R.A. tribe desiring to take advantage of 25 U.S.C. § 396b and assume control of the leasing process must specify the procedures for leasing in its constitution or charter, and the constitution or charter must be approved by the Secretary under 25 U.S.C. §§ 476-477. *See* 60 I.D. 331 (1949). Thus, the fact that the Jicarillas *could* displace the federal leasing and regulatory process if

is consistent with the present overriding national interests in promoting exploration for and development and extraction of domestic oil and gas reserves.[32] These overriding national interests clearly would be frustrated by tribal taxation, particularly where such taxation is urged by its proponents as a "sovereign tool" to restrict the rate of extraction.[33]

In sum, the Tenth Circuit failed to recognize or appreciate the importance of the federal interests affected by the proposed tribal tax. The teachings of *Colville* mandate a conclusion that overriding federal interests would be frustrated by permitting the tribal tax, and that the Jicarilla Tribe has been divested of the power to impose *this* tax by federal legislation and by necessary implication of its dependent status.

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they would adopt the required constitution and obtain Secretarial approval is hardly an invitation to ignore the federal policies *presently* existing and applicable to the Jicarilla leases. Those policies are inconsistent with and would be frustrated by the Tribal tax.

[32] President Carter said in his State of the Union Address, January 23, 1980, 126 Cong. Rec. H. 166, H. 168 (daily ed.):

> "Our excessive dependence on foreign oil is a clear and present danger to our nation's security.
>
> The need has never been more urgent.
>
> * * * *
>
> The single biggest factor in the inflation rate last year . . . was from one cause, the skyrocketing prices of OPEC oil. We must take whatever actions are necessary to reduce our dependence on foreign oil—and at the same time reduce inflation."

These national interests are also reflected in legislation. Energy Supply and Environmental Coordination Act of 1974, 15 U.S.C. §§ 791 *et seq.*; Natural Gas Policy Act, 15 U.S.C. §§ 3301 *et seq.*

[33] *See* pages 9-10 & note 18 *supra.*

III. WHETHER THE POWER TO EXCLUDE NON-MEMBERS FROM THE RESERVATION INCLUDES THE POWER TO TAX PRODUCTION BY MINERAL LESSEES ON EXECUTIVE ORDER RESERVATIONS IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The power to tax recognized in *Colville* appears to be based on the power to exclude non-members from the reservation or attach conditions to their entry. This is the conclusion of the attorney generals' and solicitor's opinions relied upon by the Court in *Colville*:

> "Chief among the powers of sovereignty recognized as pertaining to an Indian tribe is the power of taxation. Except where Congress has provided otherwise, this power may be exercised over members of the tribe *and over non-members*, so far as such non-members may accept the privileges of trade, residence, etc., to which taxes may be attached as conditions."

Colville, Slip Op. at 16 (emphasis the Court's). *Morris* v. *Hitchcock*, 194 U.S. 384, 393 (1904) upheld the permit tax there imposed specifically on the power to exclude recognized by treaty and the Curtis Act. The lower federal court cases also cited in *Colville* (Slip Op. at 16) and relied upon by the Court of Appeals (App. A at 13a) again involved permit or license taxes imposed as a condition of entry. In *Colville*, the Court noted that the relevant treaties "can be read to recognize inherent Tribal power to exclude non-Indians or impose conditions on those permitted to enter. . . ." Slip Op. at 19. The taxes imposed here, however, are far different from those imposed in *Colville* or in *Morris* v. *Hitchcock*, and the Court of Appeals clearly erred in concluding that there was "no essential difference" between the taxes here levied and those approved in *Morris* v. *Hitchcock* (App. A at 15a).

The tribal cigarette tax upheld in *Colville* is easily justified by the power to exclude non-Indians. However, the instant tribal severance tax cannot be so justified. Unlike the cigarette purchasers in *Colville*, who had no prior contract, Petitioners were previously permitted entry to the reservation pursuant to their leases, approved by the Secretary of the Interior, which attached conditions to such entry (payment of bonus, rental, and royalties) and prohibited any increase in royalties without the written consent of both parties. The right to levy a severance tax was not reserved. The subsequent levy of that tax in practical effect unilaterally increases the royalties, contrary to the terms of the leases. Surely, the status of the Jicarilla Tribe does not permit it thus to ignore its contracts.[34] At the very least, the prohibi-

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[34] If such a tax were imposed by a state or the federal government under similar circumstances, it would raise serious problems under the contract clause or the due process taking clause of the Fifth Amendment. *See Puerto Rico* v. *Russell & Co.*, 315 U.S. 610 (1942) (indicating that when a local government contracts to provide natural resources for a given consideration, it cannot change the value of that consideration by later imposing a special tax on those with whom it has contracted); *Murray* v. *Charleston*, 96 U.S. 432 (1877) (a State may not restrict its own contractual obligations under the guise of levying taxes on the subject of the contract); *cf. Perry* v. *United States*, 294 U.S. 330, 350-54 (1935) (construing "taking" under Fifth Amendment as broadly as "impairment" under Contract Clause); *United States Trust Co.* v. *New Jersey*, 431 U.S. 1, 21-30 (1977) (criteria for determining whether a state has violated the Contract Clause). *But see J. W. Berry Co.* v. *City of Norfolk*, 220 U.S. 472 (1911); *Chicago Theological Seminary* v. *Illinois*, 188 U.S. 662, 672 (1903) (grants of exemption from state taxation will not be implied); *Wells* v. *Savannah*, 181 U.S. 531 (1901).

Such a "taking" in violation of existing contract rights would violate due process and contract clause principles made applicable to Indian tribes by the "taking" clause of the Indian Civil Rights Act, 25 U.S.C. § 1302(5) (1976), as well as

tion against unilateral increases contained in the leases suggests a federal policy inconsistent with this subsequently imposed Tribal severance tax.

Since this Tribal severance tax cannot be justified by the power to exclude, some other basis must be found. There are substantial questions whether any such basis exists, and *Colville* gives little guidance on the point. One of the reservations in *Colville* was an Executive Order reservation, but it is doubtful that the power to tax can be based solely on the existence of an Executive Order reservation or any theory that the Jicarillas "own" the minerals therein. The "title" of the Jicarillas is of a peculiar and limited character. They have the right of occupancy subject to the plenary power of Congress to control use; they are tenants at will whose tenancy can be terminated without compensation. *Sioux Tribe* v. *United States*, 316 U.S. 317, 327 (1942); *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676, 686-87 (9th Cir. 1976). Prior to the 1927 Act, minerals underlying Executive Order reservations had been leased as part of the public domain, with the tribes receiving nothing, as explained in Part II above. Even a fee owner cannot, without some powers of government, "tax" existing mineral leases. Thus, the claimed right of the Jicarillas to impose the severance tax cannot spring from some concept that they "own" the minerals.[35]

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the commerce clause principles discussed at pages 20-25 *infra*. *Cf. Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56-57 (1978).

[35] Conversely, an Executive Order reservation can justify taxation under the power to exclude, as was held in *Colville*. Whatever "title" an Executive Order bestows, it at least grants the right of occupancy which alone is sufficient to exclude non-Indians and to attach conditions to their entry, such as the payment of a tax on cigarettes purchased while on the reservation.

Nor can support for the tax be easily found in some general sovereign power over non-Indians. As noted by Chief Judge Seth's dissenting opinion (App. A at 30a-33a), the Jicarillas had not exercised any such power during the Spanish or Mexican occupations, and no such power was granted to them in the Treaty of Guadalupe Hidalgo. Moreover, any such general governmental power —to impose taxes apart from attaching them as conditions to entry—would raise grave questions concerning constitutional limitations on that power [36] and would seem to be a power "inconsistent with [the tribes'] status." *See Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 208 (1978).

The Court of Appeals erred in concluding that the "power to exclude" justifies this severance tax. This Court should decide whether tribes, especially those occupying Executive Order reservations, have any power to levy severance taxes where the "power to exclude" is inapplicable.

IV. THIS CASE PRESENTS IMPORTANT QUESTIONS OF FIRST IMPRESSION AS TO THE LIMITS PLACED ON TRIBAL POWER TO TAX NON-INDIANS BY THE INTERSTATE AND INDIAN COMMERCE CLAUSE.

Under the Interstate and Indian Commerce Clause, the Tribe's Oil and Gas Severance Tax is invalid if it unduly burdens "Commerce . . . among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3. As the Court of Appeals noted,[37] the present case

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[36] Indian "tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority," *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978), at least when dealing with their own members.

[37] App. A at 16a.

is the first to require the courts to analyze the scope of the limitation on tribal taxation arising from the Indian Commerce Clause.[38] The case also presents a novel issue under the Interstate Commerce Clause, since commerce is impeded not by action of a state, but by that of an Indian tribe.[39] The many lower courts now considering challenges to the validity of the growing number of tribal taxes[40] need guidance from this Court as to the constitutional limitations upon discriminatory or burdensome tribal taxation. The need for direction is especially acute in light of the major impact such taxes will have upon the cost and supply of fuels vital to the nation's well-being.

A. The Tribal Tax Discriminates Against Interstate and Indian Commerce.

The Court of Appeals has misconstrued the Tribe's Ordinance and the decisions of this Court in holding that the tax does not discriminate against interstate commerce and Indian commerce. The severance tax by its terms applies only to oil and gas "sold or transported off the Reservation."[41] The tax thus discriminates on its face

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[38] The Court in *Colville* recognized that the Indian Commerce Clause may have a "role to play in preventing undue discrimination against, or burdens on, Indian commerce." Slip Op. at 20.

[39] The Court of Appeals believed that, while the Tribe's taxation was not "subject directly" to the negative implications of the Interstate Commerce Clause because a tribe is not a state, traditional analysis under the Interstate Commerce Clause should be pursued to determine "whether a tribe's tax legislation infringes upon the national interest in maintaining the free flow of interstate trade" (App. A at 16a). As noted herein, we believe this tribal tax contravenes both Clauses.

[40] *See* pages 6-8 & notes 9-11 *supra*.

[41] *See* page 4 *supra*. The Tenth Circuit's conclusion that this phrase is "ambiguous" and should be read as "sold

between products taken off the reservation and products utilized on the reservation.[42] A tax that imposes a heavier liability upon out-of-state sales than upon in-state sales

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on the reservation or transported off the reservation before sale" (App. A at 19a) is clearly erroneous. Such a reading is contrary to the conclusion of the District Court (App. C at 7c) (Conclusion 6) as well as the clear language of the Ordinance and the instructions mailed to lessees (App. N at 2n, 6n). The Court of Appeals' analysis of the discrimination question (App. A at 17a-19a) is thus of little relevance in light of its fundamental misconception of the clear purpose of the Tribe's tax.

[42] The fact that at present all oil and gas except that used in lessees' operations and that received by the Tribe in kind are sold or transported off the reservation and thus taxed is irrelevant. If the tax is allowed to stand, in the future, as Judge Barrett stated in dissent,

> "those businesses engaged in exclusive *intrastate* refining, marketing and distribution of oil and gas who purchase that portion of the oil and gas retained on the Tribe's land and thus not subject to the Tribal Severance Tax, would enjoy a discriminatory competitive advantage over those businesses supplying the oil and gas produced from the Reservation lands moving into *interstate* commerce. The in-state businesses would not be assessed the Tribe's Severance Tax, while the out-of-state businesses would. The impact would thus be an unequal competitive footing." (App. A at 63a.)

Moreover, any refiner on the reservation itself would be given a competitive advantage over Petitioners. Such a possibility is not mere speculation. The Tribe has announced its intentions to use royalty gas for industry and for agriculture and to enter into the natural gas production and marketing business. Tr. at 257, 271; *Jicarilla Apache Tribe* v. *FERC*, 578 F.2d 289, 290 (10th Cir. 1978); Plaintiff's Amended Proposed Findings of Fact and Conclusions of Law, Proposed Finding No. 78, in *Jicarilla Apache Tribe* v. *Southern Union Gas Co., et al.*, D.N.M. No. CV-75-247M.

and provides "a direct commercial advantage to local business" violates the Interstate Commerce Clause.[43] A similar result should be reached under the Indian Commerce Clause if the reservation line is treated as if it were a state line, since the tax favors those in business on the reservation over those, like Petitioners, engaged in commerce extending across the reservation line.

B. The Tribe's Oil and Gas Severance Tax Imposes a Multiple Burden on Interstate Commerce in That the State of New Mexico Taxes the Same Activity.

This Court has long recognized that state tax statutes that are not apportioned on their face to the value of activities carried on within the taxing state cause the risk of multiple taxation, in that local activities related to interstate commerce may be subjected to a "multiple burden" of taxation to which purely local commerce is not exposed.[44]

The Tenth Circuit has misapplied the Commerce Clause and this Court's decision in *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250 (1938), in concluding that since only one "state"—New Mexico—could tax the local event of severance, there is no possibility of multiple taxation. (*See* App. A at 20a.) But the reach

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[43] *Boston Stock Exch.* v. *State Tax Comm'n*, 429 U.S. 318, 329 (1977) (quoting *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 457 (1959)); *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 126 (1978).

[44] *See, e.g., Department of Revenue* v. *Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750 (1978); *Standard Pressed Steel Co.* v. *Department of Revenue*, 419 U.S. 560, 563-64 (1975); *J. D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 311 (1938); *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 255-56, 260 (1938); *Coverdale* v. *Arkansas-Louisiana Pipe Line Co.*, 303 U.S. 604, 612-613 (1938).

of the Commerce Clause is not confined to the actions of states alone; it regulates all activities which affect commerce. For example, under the Interstate Commerce Clause, municipal ordinances have been struck down as favoring local residents over out-of-state residents, even in cases in which in-state residents from outside the municipality were subject to the same disadvantage as the out-of-state residents.[45] Where, as here, the taxing authority competing with a state is a "sovereign" Indian tribe, not subject to the control of states over lesser governmental authorities like municipalities, or to the ultimate voting power of the taxpayers, there is even stronger reason for federal scrutiny.

The multiple taxation in this case is unique in that the two bodies that have imposed taxes upon the severance of oil and gas moving in interstate commerce,[46] unlike two geographically separated states, are independent but geographically concentric. Both bodies can claim that they are taxing an activity carried on within the territory of the sovereign, *i.e.*, the severance of the same

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[45] *See, e.g., Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 354 & n.4 (1951); *West Point Wholesale Grocery Co.* v. *City of Opelika*, 354 U.S. 390 (1957); *cf. Hanley* v. *Kansas City S. Ry.*, 187 U.S. 617, 620 (1903) (implying, in the context of rate setting, that an Indian Territory would be powerless under the Commerce Clause to regulate in a situation where a state would be powerless); *Muskogee Nat'l Tel. Co.* v. *Hall*, 118 F. 382, 384-385 (8th Cir. 1902) (tribe cannot obstruct interstate commerce by giving an exclusive franchise on the reservation if a state could not do so).

[46] There is no serious dispute that Petitioners are engaged in interstate commerce. As the District Court found, some 80% of the oil and gas extracted from the reservation by Petitioners is sold into interstate commerce. *See* page 3 *supra*. This finding was accepted by the Tenth Circuit for purposes of the appeal. (App. A at 17a.)

oil and gas from the same land.[47] Both bodies can claim that the tax is levied only with respect to the value of activities within the taxing jurisdiction, and that, therefore, the tax is automatically "fairly apportioned" and there is no multiple burden on interstate commerce.[48] In these unique and hitherto unexamined circumstances, traditional analysis is inadequate and a new standard must be devised to protect the important commerce involved from such a multiple burden. *Compare Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 452 (1979).[49] Because two "sovereigns" are imposing taxes on a single event, at "full value," *id.* at 447, and a multiple burden has been established that cannot be cured by traditional notions of apportionment, and because the multiple burden disadvantages interstate commerce originating on the Reservation, the tax should fall under the Interstate and Indian Commerce Clause.

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[47] Of course such an argument would assume—contrary to Petitioners' position—that the tax is not on the very process of interstate commerce. *See Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, 167 (1954); and *see* App. A at 62a-64a (Barrett, J. dissenting from the Opinion of the Court of Appeals) (reasoning that the tax constitutes an invalid tax on an integral part of the process of interstate commerce since it only applies to oil and gas sold or transported off the reservation).

[48] *See Department of Revenue* v. *Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750 (1978).

[49] If the combined effect of the Indian tax and the state tax is to create a multiple burden, the question of which tax must fall is answered in this case by the Congressional preference for taxation by the states. 25 U.S.C. § 398c.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that a writ of certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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